



## INTERIOR BOARD OF INDIAN APPEALS

Jeff Hunt v. Aberdeen Area Director, Bureau of Indian Affairs

31 IBIA 8 (05/12/1997)

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## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

JEFF HUNT,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 96-63-A
ABERDEEN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	May 12, 1997

This is an appeal from a February 20, 1996, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing trespass fees in the amount of \$4,431.08. The Area Director's decision was issued following the Board's remand in Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, 28 IBIA 288 (1995) (CRST). For the reasons discussed below, the Board affirms the Area Director's decision.

Virtually all of Appellant's arguments are directed to the Board's decision in CRST. In essence, Appellant seeks to relitigate that case. Both the Cheyenne River Sioux Tribe (Tribe) and the Area Director object to Appellant's efforts in this regard, contending that Appellant had an opportunity to participate in CRST and failed to do so.

The Board noted in CRST, 28 IBIA at 292 n.6, that "Hunt has not participated in this appeal, although he has been advised of all proceedings and has been served with all filings." For the first time in his reply brief in this appeal, Appellant contended that "[i]t is Appellant's recollection, and he so asserts, that he never received any of the above-listed documents [the pleadings and decision in CRST]" and that he "became aware of the Board's decision in [CRST] on March 22, 1996, when it, together with the Area Director's letter of February 20, 1996 reassessing the trespass fees in question, was personally served on him." Appellant's Reply Brief at 2.

Because Appellant did not make this contention until he filed his reply brief, the Tribe sought permission to file a supplemental brief. By order of September 17, 1996, the Board allowed the Tribe and the Area Director to file supplemental briefs and allowed Appellant to file a supplemental reply. <sup>1/</sup>

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<sup>1/</sup> The Board stated:

"The Board normally does not consider arguments raised for the first time in a reply brief. Therefore, additional briefing is normally not necessary. However, in the hope that this matter can be resolved finally, the Board will allow additional briefing in this case."

The Tribe contends:

Appellant's new assertion that he was not properly served with any of the pleadings or with the decision of the Board in [CRST] goes to the very core of his pending motion for reconsideration [i.e., this appeal]. Inexplicably, appellant did not raise this fundamental issue in his notice of appeal or in his opening brief; instead, he chose to raise it for the first time in his reply to the arguments of the Aberdeen Area Director and the Tribe.

Appellant's new assertion regarding service is inconsistent with--indeed, **it is in direct conflict with**--the representations he made in his opening brief. Appellant now argues that he did not participate in [CRST] or appeal the Board's decision because he did not have notice of the proceedings or the Board's decision. App. Rep. Br. at 1-2. However, in his opening brief, appellant explained his reasons for not participating as follows:

The Board . . . noted that Mr. Hunt did not participate in [CRST].  
**He had not because he was of the belief that he had paid his assessed penalty and was not involved in the dispute represented in the appeal.**

Appellant's Opening Brief at 3 (emphasis added [by the Tribe]).

Tribe's Supplemental Brief at 3-4.

In his reply to the Tribe's argument, Appellant contends that he made his assertion concerning lack of service in response to the arguments made by the Tribe and the Area Director in their answer briefs. He also argues that his assertion concerning lack of service is not inconsistent with the reason given in his opening brief for his failure to participate in CRST. He explains:

After Appellant received the April 1, 1994, Area Office decision and the elapse of the thirty (30) day appeal period, he paid the assessed penalty and considered the matter concluded. When an appeal from this decision was filed **five (5) months later** by the [Tribe], [2/] he did not receive notice of the filing of the [Tribe's] appeal nor did he receive copies of subsequent filings. It was **not** until March 22, 1996 that he was provided a copy of the Board's November 24, 1995 decision as part of service of the Aberdeen Area Office's remand decision dated February 10, 1996.

Appellant's Supplemental Reply Brief at 2.

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<sup>2/</sup> As discussed in CRST, the Tribe, a landowner and thus an interested party, was not sent a copy of the Area Director's Apr. 1, 1994, decision or given appeal instructions in accordance with 25 C.F.R. 2.7. Thus, its time for filing a notice of appeal was tolled.

The Board finds itself in agreement with the Tribe on this point. It simply defies belief that Appellant did not receive any of the pleadings or the decision in CRST until March 22, 1996, yet failed to mention that remarkable fact in his opening brief in this appeal, in which he seeks to reargue CRST. Appellant is represented by counsel in this appeal. Counsel must have been aware that an attempt to relitigate a decided case would require extraordinary justification, including an explanation for Appellant's failure to participate in the earlier proceedings, and that such a justification should be put forth at the earliest opportunity, *i.e.*, in the notice of appeal or opening brief. Yet the only reason given in Appellant's opening brief for not participating in the earlier proceedings was that Appellant "was of the belief that he had paid his assessed penalty and was not involved in the dispute represented in the appeal." Appellant's Opening Brief at 3.

Appellants' statement that he did not receive the pleadings or the decision in CRST has every appearance of a conveniently recollected "fact"--a fact, however, which is asserted only in the brief and is not supported by an affidavit under oath or a declaration under penalty of perjury.

Further, as the Tribe argues, the statement is inconsistent with the statement made in Appellant's opening brief. The statement in his opening brief indicates that Appellant was aware of the appeal in CRST but chose not to participate. The statement in his reply brief indicates that he was not aware of the appeal at all.

The Board declines to consider Appellant's belated assertion that he did not receive any of the pleadings or the decision in CRST.

As noted above, Appellant stated in his opening brief that he did not participate in CRST because he did not believe he was involved in the dispute. It is difficult to understand how Appellant could have formed such a belief, given the fact that the subject of the dispute was a trespass fee charged against him. However, even if Appellant truly failed to understand the implications of the Tribe's appeal, it would not matter at this point. Appellant had an opportunity to participate in that case and failed to do so. Therefore, with one exception, the Board declines to consider Appellant's arguments insofar as they seek to relitigate CRST. *Cf. Winlock Veneer Co. v. Juneau Area Director*, 28 IBIA 149, *recon. denied*, 28 IBIA 220 (1995) (The Board will not consider arguments that could and should have been raised in prior litigation concerning the identical subject matter).

The Board makes an exception for a jurisdictional argument made by Appellant, in accordance with prior cases in which the Board has considered belated jurisdictional challenges. *E.g., Falcon Lake Properties v. Assistant Secretary--Indian Affairs*, 15 IBIA 286 (1987).

Appellant contends that the Board lacked jurisdiction over the dispute in CRST because the appeal was brought by the Tribe on behalf of Ted Knife, Sr., the permittee of range unit 297, the unit upon which Appellant's cattle were found in trespass. Appellant contends that Knife was not a person

with standing to challenge the Area Director's decision because 25 C.F.R. § 166.24(b) does not require that damages for forage consumed be paid to a lessee. 3/ Appellant contends:

Mr. Knife \* \* \* had no right or entitlement to any fees assessed against [Appellant]. The decision by the Area [Director] reducing the fees to be collected did not adversely impact upon Mr. Knife. Any monies Mr. Knife may have received arising out of any trespass would be granted at the discretion of [BIA].

Appellant's Opening Brief at 4.

Even if Knife had no absolute right under the regulations to a payment of damages for forage consumed, his right to use the range unit was infringed to the extent of the trespass, and his right to the forage was diminished to the extent the forage was consumed by the trespassing cattle. For these reasons, Knife had an interest in the enforcement of trespass penalties against Appellant and, accordingly, had standing as an appellant in CRST. 4/

The Board rejects Appellant's contention that the Board lacked jurisdiction over the dispute in CRST.

Appellant concedes that the Area Director's February 20, 1996, decision on remand followed the mandate of the Board's decision in CRST. Appellant has failed to show error in the Area Director's decision on remand.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's February 20, 1996, decision is affirmed.

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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3/ 25 C.F.R. § 166.24(b) provides, in relevant part:

"All payments for such [trespass] penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid."

4/ In fact, it appears that Knife may well have had reason to expect compensation for the trespasses at issue in CRST. Appellant and the Tribe have submitted documents concerning other trespasses committed by Appellant. These documents show that trespass fees in the amount of \$813.81 were paid by Appellant or on his behalf (Appellant states that he has no recollection of paying these fees) and were subsequently paid over to Knife.